

STATE OF MICHIGAN
COURT OF APPEALS

ELAN DESIGN, INC.,

Plaintiff/Counterdefendant-
Appellant,

v

MANSUR C. KHERKHER,

Defendant/Counterplaintiff-
Appellee,

and

JACLYN KHERKHER,

Defendant-Appellee,

and

STERLING SAVINGS BANK and
PRUDENTIAL HOME MORTGAGE
COMPANY, INC.,²

Defendants.

UNPUBLISHED

April 17, 2003

No. 227047

Oakland Circuit Court¹

LC No. 96-514524-CK

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment for defendants. We affirm.

Defendants began construction of a new home on property that was adjacent to their existing home. Plaintiff³ and defendants entered into a contract for construction and installation

¹ Judge Kenneth H. Hempstead of the Fifty-First District Court presided over the bench trial, sitting as a circuit court judge by assignment.

² These defendants were dismissed from the case before trial and are not parties to this appeal.

of custom cabinetry in the new home. The contract, signed in September 1994, contained the following provision regarding delivery:

TIME OF DELIVERY – Every effort will be made by Seller to have all merchandise completed and ready by the promised date, but since we are in the custom fabrication business, the length of time that we quote is approximate. It is subject to the complexity of our work and availability of our materials. Delivery dates stated are based from the time of the order. If approvals are required, delivery is based from [the] time approvals are received. Seller is not liable for any damages arising from delays or stoppages caused by strikes, fire, flood, embargoes, accidents, shortages, existing or future statutes, laws, ordinances, rules, regulations, policies or orders of the Federal or of any State or Municipal Government, Department or Agency thereof, or causes beyond our control.

On the contract, plaintiff handwritten that the “Date Promised” would be “WHEN NEEDED.”

After the basement of defendants’ new home was completed, it was heated. Therefore, plaintiff could prepare cabinetry during the construction process and store the cabinetry in the basement of the new home until it could be installed. Plaintiff brought over initial pieces that were stored in the basement and received periodic payments totaling \$30,000 of the \$45,000 contract price. However, as the completion of the home neared, defendants alleged that the cabinetry project delayed other contractors working on the home. Plaintiff attributed delays to his suppliers, his employees, and defendants’ drywall installation delay. Despite these delays, plaintiff alleged that he was merely two to three weeks behind schedule for completion of the contract. Plaintiff testified that he learned that other contractors had been retained to complete his contracted cabinetry work when he saw them working in the home. Plaintiff denied the allegation that he advised defendants to retain other contractors to complete some of the cabinetry projects. At trial, plaintiff testified, on direct examination and without objection, that “when needed” meant that “I ha[d] every intention as when the building was ready, we would be ready to install.” It was plaintiff’s idea to write “when needed” on the contract. Plaintiff requested the remaining portion of the contract price, plus the cost extra items added to the contract by defendants as damages for breach of contract, unjust enrichment, and lien foreclosure.

Defendants testified that, initially, plaintiff’s cabinetry construction proceeded smoothly and pieces were stored in the basement until they could be installed. However, as the time for completion of the home arrived, defendants were told that cabinetry items had been completed, but were not delivered. When defendants went to plaintiff’s business premises to inspect the cabinetry, they learned from employees that the cabinetry was not completed. Defendants testified that plaintiff admitted having financial and staffing problems. Defendants further testified that plaintiff advised them to retain other contractors to complete cabinetry projects because he could not finish the work. The time span for completion of the contract was

(...continued)

³ For purposes of clarity, the term “plaintiff” refers to the corporate entity’s sole owner, Elan Bower, who testified regarding the circumstances surrounding entry into and performance of the contract.

important to defendants because of the sale of their existing home on an adjacent parcel and a planned visit by relatives. Defendant Mansur Kherkher, a business owner, testified that he advised plaintiff that he wanted the home to be completed by April 1995. However, he acknowledged that he did not request that the date be written into the contract or request a “time is of the essence” clause. Defendants counterclaimed that they suffered damages as a result of plaintiff’s breach of contract, which included the maintenance of the construction mortgage.

Following a two-day bench trial, the court held that plaintiff breached the contract, and therefore, was not entitled to his requested damages aside from the recovery of “extras.”⁴ The trial court concluded that defendants were damaged to the extent that duplicate mortgage payments were made as a result of the delay caused by plaintiff, awarding \$8,056 on the counterclaim. The trial court denied defendants’ request for payments to other cabinetry contractors to complete plaintiff’s work because plaintiff had not billed defendants for this work.

Plaintiff first alleges that the trial court erred in admitting parol evidence to conclude that plaintiff had breached the contract. To challenge, on appeal, the admission of evidence at trial, a party must timely object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *Anton v State Farm Mutual Automobile Ins Co*, 238 Mich App 673, 688; 607 NW2d 123 (1999). Review of the record reveals that there was no objection to any testimony addressing the parties’ interpretation of and intention when entering into the contract. Furthermore, plaintiff’s counsel elicited from plaintiff the testimony regarding the insertion of the phrase “when needed” into the contract. Therefore, we need not address this issue. *Id.*⁵

Plaintiff next alleges that the trial court erred by failing to conclude that defendants first breached the contract by retaining new contractors to complete the contract. We disagree. Following a bench trial, the trial court’s conclusions of law are reviewed by this court de novo, and the factual findings are reviewed for clear error. *Lamp v Reynolds*, 249 Mich App 591, 595; 645 NW2d 311 (2002). If this Court is left with a definite and firm conviction that the trial court has made a mistake, the finding is clearly erroneous. *Id.* When evaluating the trial court’s factual findings, we defer to the trial court’s superior ability to judge the credibility of the witnesses who appeared at trial. *Brooks v Rose*, 191 Mich App 565, 570; 478 NW2d 731 (1991).

In this case, the trial court was presented with diametrically opposed versions of events. Plaintiff testified that he was a mere two to three weeks from completion of the contract, despite employee, supplier, and drywall delays. Defendants, however, testified that plaintiff acknowledged his inability to complete the contract and approved of defendants’ retention of other contractors to finish the work. Defendants denied the allegation that a delay occurred as a result of their drywall work. In concluding that plaintiff breached the contract, the trial court’s factual findings cited to the deficiencies in plaintiff’s testimony. We cannot conclude that the

⁴ The parties stipulated at trial to the amount of extras requested by defendants.

⁵ Parol evidence is not admissible to vary a contract that is clear and unambiguous, but may be admitted to clarify the meaning of an ambiguous contract. *Meagher v Wayne State University*, 222 Mich App 700, 722; 565 NW2d 401 (1997). We note that admission of the evidence was proper where the contract contained two contradictory provisions regarding the time frame for delivery.

trial court's assessment of the credibility of the witnesses was clearly erroneous. *Lamp, supra*. Accordingly, plaintiff's claim of error is without merit.

Plaintiff next alleges that the trial court erred in awarding damages that included expenses unrelated to the contract or its performance. We disagree. Expectancy damages or damages designed to make the complaining party whole are awarded in a common-law breach of contract⁶ action. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 586 n 4; 624 NW2d 180 (2001). These damages include those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made. *Id.* Review of the record reveals that defendants requested completion by early spring in order to place their existing home on the market at an opportune time. Therefore, we cannot conclude that the trial court's factual finding regarding this damage award was clearly erroneous. *Lamb, supra*.

Lastly, plaintiff alleges that the trial court erred by failing to award plaintiff full reimbursement for all completed work. We disagree. The trial court's factual findings are reviewed under the clearly erroneous standard. *Lamb, supra*. Review of the record reveals that plaintiff did not itemize his individual charges for cabinetry to be provided in each room of the home. Therefore, the subtraction of various items that were not provided by plaintiff could not be verified by review of the contract. Furthermore, plaintiff could not recall whether certain items were provided to the home. The trial court incorporated the deficiencies in plaintiff's record keeping into its factual findings, and we cannot conclude that the findings were clearly erroneous. *Id.*

Affirmed.

/s/ Hilda R. Gage
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood

⁶ Review of the complaint reveals that plaintiff pleaded a breach of contract action without specifying that the Uniform Commercial Code (UCC) was applicable. Based on the record available, there is no indication that the application of the UCC was raised or addressed below. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). Furthermore, this contract involved mixed goods and services, the creation and installation of custom cabinetry. Therefore, the application of the UCC is contingent upon whether the purpose of the contract was the rendition of the services with goods incidentally involved or the transaction was a sale with services incidentally involved. *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 534; 486 NW2d 612 (1992). Because this issue was not raised and addressed below by the trial court, we will not address it for the first time on appeal. *Miller, supra*.